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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1940.

MONARCH DISTRIBUTING COMPANY, a Corporation, and
JOSEPH S. MEYER,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Seventh Circuit,

With

SUPPORTING BRIEF.

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To the United States Circuit Court of Appeals for the Seventh Circuit.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Monarch Distributing Company, a corporation, and Joseph S. Meyer, petitioners, by Harold J. Bandy and John M. Karns, their counsel, petition this Honorable Court to grant the writ of certiorari, addressed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding it and the clerk thereof to certify to this Honorable Court the records and proceedings of the above-entitled case in that court, numbered 7281 therein, wherein your petitioners were appellants, and respondent, United States of America, was appellee, together with its opinion therein, for review and determination of said cause by this Court.

Petitioners tender herewith their petition, supporting brief, and a certified copy of the entire record in the cause, together with ten copies of the record as printed in the United States Circuit Court of Appeals.

OPINION BELOW.

The opinion of the Circuit Court of Appeals was filed December 5, 1940. Petition for rehearing was denied December 18, 1940. A copy of the opinion appears in the appendix which follows petitioners' supporting brief.

STATEMENT OF THE MATTER INVOLVED.

Petitioner, Monarch Distributing Company, an Illinois corporation, is engaged in the wholesale liquor business at East St. Louis. Petitioner, Joseph S. Meyer, is president of the corporation.

Petitioners were jointly indicted in case No. 15,126 in the District Court of the United States for the Eastern District of Illinois. The first eleven counts charge petitioners with making false entries in records which wholesale liquor dealers are required to keep. The twelfth count charges conspiracy.

Monarch Distributing Company was also indicted in cause No. 15,129. This indictment contains seven counts. Counts 1, 2, 3, 5 and 6 charge the corporation with making false entries in records required to be kept by it in accordance with rules and regulations prescribed by the Commissioner of Internal Revenue. Count 4 charges the corporation with causing certain liquor to be shipped in packages that were not so labeled on the outside cover as to plainly show the name of the consignee, the nature of the contents of said packages and the quantity of spirituous liquors contained therein. The seventh count charges conspiracy.

The indictments were consolidated and petitioners were tried by the Court without a jury. The Court convicted petitioners upon all counts of indictment 15,126, excepting count 11, and found the corporation guilty upon all counts of indictment 15,129. The corporation was sentenced to pay a fine of $2,500.00 upon each indictment. Petitioner Meyer was sentenced, upon his conviction in case No. 15,126, to pay a fine of $1,000.00 and to serve a term of two years' imprisonment (R. pp. 425-430, incl.).

The counts which charge petitioners with making false entries allege violation of the following Act of Congress, enacted June 26, 1936 (26 U. S. C. A., Section 1208):

> "Every rectifier and wholesale liquor dealer shall keep daily, at his place of business covered by his special tax stamp, a record of distilled spirits received and disposed of by him, and shall render under oath correct transcripts and summaries of such records; Provided, That the Commissioner may in his discretion require such record to be kept at the place where the spirits are actually received and sent out. The records shall be kept and the transcripts shall be rendered in such form and under such rules and regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe.
>
> The records required to be kept under the provisions of this section, and regulations issued pursuant thereto, shall be preserved for a period of four years, and during such period shall be available during business hours for inspection and the taking of abstracts therefrom by the Commissioner or any internal revenue officer.
>
> Every rectifier and wholesale liquor dealer who refuses or neglects to keep such records in the form prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, or to make entries therein, or cancels, alters, or oblit-

> erates any entry therein (except for the purpose of correcting errors) or destroys any part of such records, or any entry therein, or makes any false entry therein, or hinders or obstructs any internal revenue officer from inspecting such records or taking any abstracts therefrom, or neglects or refuses to preserve or produce such records as required by this chapter or by regulations issued pursuant thereto, shall pay a penalty of $100 and, on conviction, shall be fined not less than $100 nor more than $5,000, and be imprisoned not less than three months nor more than three years."

The Court of Appeals affirmed the conviction of both petitioners upon counts 1 and 6 of indictment No. 15,126 and of the corporation upon counts 1, 2 and 3 of indictment No. 15,129. These counts charge making false entries in violation of the quoted statute. The Court did not pass upon the convictions under the other counts, but said: "As the penalty imposed was not more than could have been imposed under them if they had stood alone, we need not consider the other counts of either indictment for the reason that errors, if any were committed under the counts not discussed, are not grounds for reversal."

The evidence shows that the Commissioner of Internal Revenue requires a wholesale liquor dealer to keep a record of all liquor received by him upon a form known as Treasury Form 52-A, and a record of all liquor sold by him upon a record known as Treasury Form 52-B. Paragraph 22 of Treasury Department Order 4764 (published in Volume 2, Part 2, of the 1937 issue of the Federal Register on pp. 1963 to 1965) requires him to transmit a full and complete transcript of forms 52-A and 52-B to the District Supervisor of the Alcohol Tax Unit on or before the 10th day of each month, the record to contain a transcript of all the business conducted during the preceding month.

Count 1 of indictment 15,126 alleges that, on July 24, 1939, petitioners made a false entry, in their 52-A record, of the receipt of certain liquor. It avers the liquor was purchased from Skye Distributing Company of East St. Louis on July 20, 1939; that the entry was not made in form 52-A until July 24, 1939, and that said entry falsely states that the liquor was received on July 22, 1939 (R. pp. 2 and 3).

The conviction of petitioners under this count is not supported by any evidence. The record is devoid of any proof. Although this Honorable Court will not disturb a conviction on the ground of failure of proof if the record contains slight evidence from which an inference of guilt can reasonably be adduced, it will not hesitate to reverse a judgment which has no evidence to support it.

The evidence for the Government shows that petitioners received the liquor from Skye Distributing Company on July 20, 1939. Sol Auslander, an official of Skye Distributing Company, testified the liquor was sold to Monarch Distributing Company on July 21, 1939, and he exhibited the 52-B record of Skye Distributing Company corroborating this statement (R. p. 409). Petitioners recorded the receipt of this liquor in their 52-A record on July 24, and the entry shows that the liquor was received on July 22 (R. p. 132).

The prosecution concedes that the entry truthfully records every detail of the transaction except the actual date of receipt of the liquor; that it speaks the truth as to the quantity and brands of liquor purchased, the serial numbers, the price paid, the name and address of the vendor. All taxes were paid upon this liquor. The Government was not defrauded of any revenue. The Government's strongest evidence merely shows that the entry errs as to the actual day on which the liquor was received.

Petitioners sold this liquor to Melvin Thompson of Denton, Texas, on July 22, and a truthful entry of this sale was made in record 52-B (R. p. 144).

Petitioner Meyer explained the delay in making this entry. His explanation is not contradicted by any other evidence. He said: "The shipment arrived some time in the afternoon of the 21st. The next day was Saturday and I was busy. It probably laid on my desk and was not handed to the girl until some time on Monday after checking my bank account" (R. p. 389).

The opinion of the Court of Appeals erroneously holds that an entry of liquor purchased must be made on the day the liquor is received. This was true under the former law, which said: "Every rectifier and wholesale liquor dealer shall provide a book, to be prepared and kept in such form as may be prescribed by the Commissioner, and shall, on the same day, * * * enter in such book," etc. This is the Act of 1868, as amended by Act of February 27, 1877, c. 69, section 1, and Act of March 1, 1879, c. 125, section 5 (26 U. S. C. A., p. 127). Congress amended this statute on June 26, 1936 (c. 830, Title IV, section 411, 49 Stat. 1962; 26 U. S. C. A. Cumulative Pocket Part, Section 1208). The Act of 1936 provides that: "Every rectifier and wholesale liquor dealer shall keep daily, at his place of business covered by his special tax stamp, a record of distilled spirits, received and disposed of by him." This is a sharp departure from the former act which required each transaction to be entered "on the same day." It cannot be presumed that Congress did not intend the change which the new law made. The law as amended merely requires that the dealer keep the record daily (that is, at all times) at his place of business, and that he transmit transcripts of same to the Commissioner of Internal Revenue in accordance with the rules and regulations promulgated by the Commissioner. The regulation,

heretofore quoted, requires the dealer to transmit to the District Supervisor of the Alcohol Tax Unit, on or before the 10th day of each month, a complete transcript of all business done during the preceding month. If the wholesale dealer keeps the record in his place of business at all times and transmits to the District Supervisor a correct transcript of all business transacted during a month before the 10th day of the month following, he complies with the statute and the regulations. Although he must keep a truthful record of each transaction of incoming and outgoing liquor, he is under no legal compulsion to record each transaction on the very day it takes place.

Moreover, the Court of Appeals erroneously affirmed the conviction upon Count 1 on the ground that petitioners neglected or omitted to make the entry. The opinion says: "The trial court found the appellants guilty, thus, necessarily, it found that the **omission** was intentional or by design." The statute makes neglect to keep the records an offense, but petitioners were not charged with neglect or omission. They were charged with making a false entry. Proof to sustain a conviction must relate to the charge in the indictment and not to some other offense that is not alleged.

The proof most favorable to the prosecution shows that petitioners did not attempt to deceive the Government and did not defraud it of any revenue. The entry in 52-A, although not made until three or four days after the actual receipt of the merchandise, set forth the facts meticulously and made available to the United States all information necessary to enable the officials charged with enforcement of the revenue laws to enforce the same.

The opinion of the Court of Appeals overlooks the fact that an entry, to be false, must be willfully made. A willful or deliberate wrong is actuated by bad motive, for the

purpose of bringing profit or advantage to to the wrongdoer. The record shows that petitioners gained no advantage or profit through their omission, for three or four days, to record the receipt of this liquor. From the viewpoint most favorable to the Government, the evidence shows nothing more than inadvertent or negligent delay. It does not show willful falsification. Where the liberty of a citizen is involved—here the sentence of petitioner Meyer is for two years—the proof must meet the charge.

The Court of Appeals also affirmed the conviction of petitioners upon Count 6 of indictment 15,126. This count charges petitioners with making a false entry in Treasury Department Form 52-B, their record of merchandise sold. The count charges that on October 13, 1939 (R. pp. 11 and 12), petitioners entered, in Form 52-B, that they sent certain described liquor to Joe Nelson, at Leonard, Texas, but that "the aforesaid alcoholic spirits set forth on said record and purporting to be sent to the aforesaid Joe Nelson at Leonard, Texas, were not then and there sent to Joe Nelson of Leonard, Texas, but were in truth and in fact sent to one Joe Nelson, then and there located at Kansas City, in the State of Missouri, the defendants then and there well knowing that the aforesaid entry was false."

There is a total failure of proof to sustain this count, and a fatal variance between the allegation and the proof. The prosecution proved, by agents of the alcohol tax unit, that petitioners shipped this liquor c. o. d., by Riss & Co., a common carrier, to Joe Nelson, Kansas City, Missouri, and that one Chester Tork, of Topeka, Kansas, received the liquor from the common carrier at Kansas City, and paid for it. The evidence for the Government shows that Roderick and Keeman, investigators for the Alcohol Tax Unit, pursued Chester Tork, with his automobile loaded with liquor, into Kansas City, Kansas, and arrested him. Over the objections of petitioners, agent Keeman testified

that Tork, after being arrested, stated that his name was Chester Tork and that he was taking the merchandise to Topeka, Kansas (R. p. 348). The prosecution offered this testimony concerning the statement of Tork, made after he had been arrested, upon the theory that he was a co-conspirator with petitioners and that any statement made by a conspirator is admissible in evidence against his co-conspirators. It is true that the statement of a conspirator, made outside the presence of his co-conspirators, is admissible in evidence against the co-conspirators, provided the statement is made during the existence of the conspiracy, but it is also true (as shown by authorities cited in our supporting brief) that the arrest of a co-conspirator precludes any further action by him, and terminates the conspiracy as to him, and any statements made by him outside the presence of his alleged co-conspirators, after his arrest, are not competent against the alleged co-conspirators for any purpose.

The sole evidence offered by the prosecution to support the allegation that petitioners falsely recorded in their 52-B record that certain merchandise was shipped to Joe Nelson at Leonard, Texas, when it was actually shipped to Joe Nelson at Kansas City, Missouri, is the foregoing evidence that the liquor was called for and paid for by Chester Tork, and that Tork, after being arrested, said he was taking the liquor to Topeka, Kansas. There is no evidence in the record that petitioners knew Tork would call for the liquor. There is no evidence to show, or from which the inference can be raised, that petitioners knew Joe Nelson would not call for the liquor. The record shows that petitioners shipped the liquor openly, by common carrier, without any attempt at concealment. Proof that Tork called for the liquor does not touch the vital question of whether petitioners knew the liquor was to be received by someone other than Nelson.

The burden rested with the prosecution to prove that petitioners knew that the entry was false when they entered, in 52-B, that the liquor was sent to Joe Nelson at Leonard, Texas. The count charges that, when petitioners made the entry, they well knew it was false. The evidence totally fails to prove this essential averment.

Meyer explained the facts concerning this shipment, and his testimony was not contradicted. He testified that, about July 21, 1939, a man called at the office of Monarch Distributing Company in East St. Louis, introduced himself to petitioner Meyer as Joe Nelson of Leonard, Texas, and exhibited a federal retail liquor dealer's license which had been issued to him by the Collector of Internal Revenue for the Second Texas District (R. pp. 390 and 391). Before selling to him, Mr. Meyer had a photostatic copy of the federal retail liquor dealer's license made for the file of Monarch Distributing Company. It was introduced in evidence (R. p. 391). Mr. Meyer further testified that Nelson arranged, at that time, to purchase whiskey; that he stated he would probably make future orders by telephone and have the liquor shipped c. o. d.; that he gave an order by long distance telephone on July 27, 1939, and specified that it be shipped c. o. d. by Riss and Company to Kansas City, Missouri, where Nelson or his agent would pick it up and take it on to Leonard, Texas. Nelson made his order of October 13th in the same way and gave the same instructions. Meyer further testified that he shipped this liquor, as directed, to Joe Nelson, Leonard, Texas, with a stopover at Kansas City, Missouri (R. p. 392), and that all other shipments to Nelson were made in the same way, in accordance with his instructions. This testimony of petitioner Meyer is not contradicted anywhere in the record.

The incompetent testimony of Agent Keeman that Chester Tork, after being pursued into Kansas City, Kan-

sas, and caught with the liquor, said he was taking it to Topeka, Kansas, sheds no light on the basic question of whether petitioners knew the liquor was to be received by Tork and taken to Topeka. There is no evidence anywhere in the record that shows any knowledge of petitioners that this merchandise was not bound for Leonard, Texas. There is no evidence that suggests or insinuates petitioners knew Tork, an imposter, was impersonating Joe Nelson.

The record shows that Tork was in the court room, in the United States District Court at East St. Louis, when this case was tried. He was brought to East St. Louis from Kansas by agents of the Government. He was in custody, in the court room, throughout the trial. Agents of Riss and Company identified him as the man who receipted for and took the liquor. Alcohol Tax Agents Roderick and Keeman also identified him. In spite of this, Tork was not called to the witness stand. He was the one person who could have testified, of his own knowledge, whether petitioners arranged to ship liquor to him under the name of Joe Nelson. Regardless of this, the Government did not use him. It is a recognized rule of evidence that, when a witness is available to a party, and he knows the truth of the controverted issue, and he is not used by the party who attempts to prove the issue, the conclusion follows that his evidence would be adverse to the contention of the party who should have used him. Petitioners presented this contention to the Court of Appeals, but the opinion of that court ignores this unusual feature of the case.

It was urged by petitioners, in the Court of Appeals, that it was prejudicial error to receive the testimony of agents Roderick and Keeman concerning statements made by Tork, outside of the presence of petitioners, after Tork was arrested. This important question is not referred to in the opinion of the Court of Appeals.

The charge in this count, as in count 1, involves tax-paid liquor. The Government was not defrauded of any revenue, and the prosecution did not introduce any testimony proving, or tending to prove, any profit or advantage which petitioners could have gained through misrepresenting the consignee or the destination of the liquor involved in this transaction.

Petitioners further represent that the United States Circuit Court of Appeals misapprehended the allegations of count 6 and the proof relating to same. The opinion says, concerning the shipment: "There were no words describing or designating the consignee's name or address on the cartons or boxes in which liquor was contained." Apparently the court believed petitioners were charged with failing to label the packages, in violation of Title 18, section 390, U. S. C. A. The count does not contain such a charge. The charge is limited to the making of a false entry. The statement of the Court of Appeals that the name and address of the consignee were not placed on the cartons or boxes does not refer to any charge in this count and is not supported by any evidence. Neither Keeman nor Roderick, the officers who arrested Tork and seized the liquor, testified to such facts (R. pp. 346-348, incl.).

The testimony wholly fails to prove any charge contained in count 6. There is no evidence that petitioners knew the liquor was not shipped to Joe Nelson at Leonard, Texas; or indicating petitioners knew that Nelson would not receive it at Kansas City, Missouri, and take it from there to Texas; or showing that petitioners knew an imposter named Tork was pretending to be Nelson and would receive the liquor and take it to Kansas. Evidence that Tork stated, after being arrested, that he was taking the liquor to Topeka, Kansas, does not prove petitioners shipped the liquor to Tork under an assumed name, or that petitioners knew Tork would receive it and take it into

Kansas. There is no proof whatever to support the charge in count 6 that petitioners knowingly made a false entry in their 52-B record. The evidence stands unimpeached that petitioners, in good faith, shipped this liquor to Nelson at Leonard, Texas, by way of Kansas City; that they shipped it openly by common carrier to Kansas City, there to be received and paid for by Nelson and taken by him to Leonard, Texas.

Taking all the evidence for the Government as true, there is nothing in the record to show that petitioners knowingly made a false entry. There is no evidence in this record to sustain the convictions under either count 1 or 6, the counts upon which the Court of Appeals affirmed the convictions.

The allegation contained in count 6, and the proof offered by the Government in support thereof, present questions of vital importance to every merchant engaged in the wholesale liquor business. A person intending to operate a wholesale liquor business obtains a federal basic permit, a federal license and the necessary state licenses. He invests his resources in the business. A stranger appears at his place of business and seeks to purchase liquor. The stranger exhibits a federal retail liquor dealer's license that has been sold to him by the United States Government. The stranger thereby submits persuasive credentials and the wholesaler believes him and sells liquor to him. The Government in this case contends that, if this stranger is an imposter, and if he has obtained the federal retail liquor dealer's license through fraud, the wholesaler sells to him at his peril. If the wholesaler accepts the imposter in good faith, sells to him and records the sale in 52-B as being shipped to him at his supposed address, is the wholesaler guilty of falsifying his 52-B record? Must the wholesale dealer jeopardize his basic permit, his licenses, his investment and his personal liberty every time he makes an

apparently legitimate sale to a stranger? Is this the risk he must take, the price he must pay, for engaging in a legitimate business?

Indictment No. 15,129.

The transactions involved in this indictment occurred before petitioner Meyer became connected with Monarch Distributing Company. The corporation alone is involved. The Court of Appeals affirmed the conviction under the first three counts of this indictment. These counts charge falsification of the 52-B record.

There is evidence in this case to sustain the conviction. The three sales involved in these counts were recorded as being made to Mike O'Brien, Topeka, Kansas, who, by his own admission, had been a customer of the corporation. O'Brien testified that he did not make the purchases involved in these three counts. Several witnesses, employees of Monarch Distributing Company, testified that he made them, but, of course, this merely created an issue of fact, and the conclusion of the trial court will not be disturbed, in a federal court, where there is some positive evidence to support the conviction.

We concede that the writ of certiorari should not issue to review the conviction of the corporation upon indictment No. 15,129.

QUESTIONS PRESENTED.

1. Does the Act of 1936 (U. S. C. A., Title 26, section 1208) require a wholesale liquor dealer to record, in his 52-A or B record, the receipt or sale of liquor on the actual date of the transaction?

2. Does a delay of three or four days in making a truthful entry of liquor received constitute the making of a false entry within the meaning of the statute?

3. Does the Amendment of 1936, which eliminates the requirement in the former Act that a wholesale liquor dealer record each transaction "on the same day," relieve the dealer of the burden of entering a record of each receipt of merchandise on the same day it is received?

4. Can a charge of making a false entry be sustained by mere proof of negligent delay in making an entry? Or upon proof of mistake as to the actual date on which a shipment of liquor was received?

5. Is the allegation, appearing in counts 1 and 6 of indictment 15,126, that the alleged false entry was made by the defendants, said defendants "then and there well knowing that the aforesaid entry was false," a material part of the accusation that must be proved?

6. Is the statement of an alleged co-conspirator, made after he has been arrested, and outside the presence of the defendants, admissible in evidence against the defendants?

7. Is the statement of an alleged co-conspirator, made outside the presence of defendants, after the termination of the alleged conspiracy, merely the narration of a past event and not admissible in evidence?

8. If a wholesale liquor dealer sells a quantity of liquor and ships it C. O. D. by common carrier to A, and if he records the shipment in his 52-B record as being shipped to A, and it is received at its destination and paid for by B, is the dealer guilty of making a false entry in the absence of any proof that he knew the liquor would not be received by A, or that he knew it would be received by B?

9. Will a conviction be sustained if there is no proof in the record to support it?

10. When the indictment charges the defendant with

making a false entry, is the prosecution required to prove that the entry was willfully and deliberately made, with full knowledge of its falsity?

REASONS RELIED UPON FOR ALLOWANCE OF WRIT OF CERTIORARI.

Petitioners respectfully submit that a review of this case on writ of certiorari should be allowed. It should be allowed because the United States Circuit Court of Appeals has decided an important question of federal law, relating to wholesale liquor dealers, which should be settled by this Court. It should be allowed because, in convicting petitioners, the District Court and the Circuit Court of Appeals have so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

It should be allowed because the Circuit Court of Appeals has affirmed a conviction that was obtained solely upon incompetent and prejudicial evidence. This evidence consisted of testimony concerning statements of an alleged co-conspirator, outside the presence of the defendants, after the arrest of the alleged co-conspirator and after the alleged conspiracy had terminated. This conviction was accomplished through said incompetent testimony and, inasmuch as the liberty of petitioner Meyer is involved, this Court should review the record of this case. In the case of Sheppard v. U. S., 290 U. S. 96, the conviction of the defendant was accomplished through the erroneous admission in evidence of a statement which the prosecution mistakenly contended constituted a dying declaration. This Court granted certiorari and reviewed the record of that case because of the admission of the prejudicial and incompetent testimony.

If the decision of the United States Circuit Court of

Appeals in this case stands, every wholesale liquor dealer will be in constant danger of criminal prosecution, regardless of how scrupulously he attempts to operate his business in accordance with law. Unless the law is definitely settled to mean that the wholesaler must know that an entry is false at the time he makes it, and that the prosecution must prove that he knew of such falsity at the time of making the record, every wholesale liquor dealer will be in danger of prosecution and conviction each time that he records any entry of liquor received or sold. Each time that he makes an entry of liquor sold and shipped to a certain person, and it is afterward proved that the shipment was received by someone other than the consignee designated in the entry, the wholesaler will be in danger of being convicted of a felony and deprived of his liberty, regardless of whether the entry was made in good faith in the honest belief that the liquor was shipped to the person named in the entry. Mere proof that the facts recorded in the entry are not true will be sufficient to support a conviction regardless of whether the wholesaler made the entry with knowledge of its falsity or with criminal intent. An honest wholesaler will be at the mercy of every criminal adventurer who procures a federal retail liquor dealer's license and attempts to purchase liquor of him. He will deal with a stranger at his absolute peril.

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